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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87126; File No. SR-CboeEDGX-2019-049)

September 26, 2019

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule to Adopt a Pricing Structure for EDGX Top Derived Data API Service

I. Introduction

On August 1, 2019, Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the EDGX fee schedule to adopt a pricing structure related to the EDGX Top Derived Data API Service (the “Program”). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the Federal Register on August 19, 2019.⁴ The Commission received no comment letters regarding the proposed rule change. Under Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (i) temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ See Securities Exchange Act Release No. 86644 (August 13, 2019), 84 FR 42971 (“Notice”).

⁵ 15 U.S.C. 78s(b)(3)(C).

II. Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule to establish a pricing structure for Distributors⁶ of Derived Data⁷ through an Application Programming Interface (“API”). Currently, the Exchange charges a fee of \$1,500 per month for external distribution of EDGX Top.⁸ In addition, external distributors of EDGX Top are charged a fee of \$4 per month for each Professional User and \$0.10 per month for each Non-Professional User.⁹ The Exchange

⁶ A Distributor of an Exchange market data product is any entity that receives the Exchange market data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party. See EDGX Fee Schedule.

⁷ “Derived Data” is pricing data or other data that (i) is created in whole or in part from Exchange data, (ii) is not an index or financial product, and (iii) cannot be readily reverse-engineered to recreate Exchange data or used to create other data that is a reasonable facsimile or substitute for Exchange data. See Notice, supra note 4, 84 FR at 42971. The Exchange states that Derived Data is primarily purchased for the creation of certain derivative instruments rather than for the trading of U.S. equity securities. See id. at 42972.

⁸ EDGX Top is an Exchange proprietary data product that provides top of book quotations and execution information for all equity securities traded on the Exchange. See Notice, supra note 4, 84 FR at 42971.

⁹ A “Professional User” of an Exchange market data product is any user other than a Non-Professional User. See EDGX Fee Schedule. A “Non-Professional User” of an Exchange market data product is a natural person or qualifying trust that uses data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an “investment adviser” as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States. Id.

currently offers a Derived Data White Label Service¹⁰ that allows Distributors to receive reduced fees when distributing Derived Data taken from EDGX Top. Today, Distributors of Derived Data through an API are liable for the fees normally applicable for the external distribution of EDGX Top, as discussed above.

Under the Exchange’s proposal, Distributors would be charged a tiered External Subscriber Fee based on the number of API Service Platforms (i.e., “External Subscribers”) that receive Derived Data from the Distributor through the Program. As proposed, Distributors would continue to be charged a fee of \$1,500 per month for each External Subscriber if the Distributor makes Derived Data available to 1 – 5 External Subscribers. Distributors that make Derived Data available to 6 – 20 External Subscribers would be charged \$1,250 per month for each External Subscriber. Further, Distributors that make Derived Data available to 21 or more External Subscribers would be charged \$1,000 per month for each External Subscriber. Similar to the Derived Data White Label Service, the External Subscriber Fee under the Program would be non-progressive and based on the number of External Subscribers that receive Derived Data from the Distributor.¹¹ The Exchange would continue to charge a monthly Professional User fee of \$4 per month for each Professional User that accesses the Program. The Exchange proposes

¹⁰ A White Label Service is a type of hosted display solution in which a Distributor hosts or maintains a website or platform on behalf of a third-party entity. See EDGX Fee Schedule. The service allows Distributors to make Derived Data available on a platform that is branded with a third-party brand, or co-branded with a third party and a Distributor. Id. The Distributor maintains control of the application’s data, entitlements and display. Id.

¹¹ For example, a Distributor providing Derived Data based on EDGX Top to six External Subscribers that are API Service Platforms would be charged a monthly fee of \$7,5000 (i.e., 6 External Subscribers × \$1,250 each).

to eliminate the current Non-Professional User fee of \$0.10 per month when participating in the Program.¹²

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,¹³ at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,¹⁴ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

The Exchange asserts that the proposed fees for the Program are reasonable “as the proposed fee reduction would facilitate cost effective access to market information that is used primarily to create certain derivative instruments rather than to trade U.S. equity securities.”¹⁵ The Exchange also asserts that the proposed fees are “equitable and not unfairly discriminatory because the Exchange will apply the same fees to any similarly situated Distributors that elect to participate in the Program based on the number of External Subscribers provided access to Derived Data through an API Service, with Distributors providing access to six or more External Subscribers receiving a discount compared to the current pricing applicable for external

¹² The Exchange also proposes consolidate the Derived Data White Label Service and the Program under the common heading “Financial Product Distribution Program.”

¹³ 15 U.S.C. 78s(b)(3)(C).

¹⁴ 15 U.S.C. 78s(b)(1).

¹⁵ See Notice, supra note 4, 84 FR at 42973.

distribution of EDGX Top.”¹⁶ Furthermore, the Exchange states that the Program would allow the Exchange to “compete with similar products offered by other national securities exchanges that offer discounted fees to market participants that purchase Derived Data.”¹⁷

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange’s present proposal, they are required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.¹⁸ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”¹⁹

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;²⁰ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;²¹ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²²

¹⁶ Id. at 42973.

¹⁷ Id. at 42972.

¹⁸ See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

¹⁹ See id.

²⁰ 15 U.S.C. 78f(b)(4).

²¹ 15 U.S.C. 78f(b)(5).

²² 15 U.S.C. 78f(b)(8).

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the establishment of the Program is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²³

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.²⁴

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)²⁵ and 19(b)(2)(B) of the Act²⁶ to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and

²³ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

²⁴ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

²⁶ 15 U.S.C. 78s(b)(2)(B).

encourages interested persons to provide additional comment on the proposed rule change to inform the Commission’s analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,²⁷ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,”²⁸
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to perfect the operation of a free and open market and a national market system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers,”²⁹ and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”³⁰

As noted above, the proposal establishes a new pricing structure for Distributors of Derived Data through an API. The Commission notes that the Exchange’s statements in support of the proposed rule change are general in nature and lack detail and specificity. The Exchange states that it operates in a highly competitive environment, and its ability to price top of book

²⁷ 15 U.S.C. 78s(b)(2)(B).

²⁸ 15 U.S.C. 78f(b)(4).

²⁹ 15 U.S.C. 78f(b)(5).

³⁰ 15 U.S.C. 78f(b)(8).

data products is constrained by (i) competition among other national securities exchanges, including The Nasdaq Stock Market LLC (“Nasdaq”), that offer similar data products, and pricing options, to their customers; and (ii) the existence of real-time consolidated data disseminated by the securities information processors.³¹ The Exchange also states that the proposed pricing structure for Derived Data reduces the cost for market participants to access top of book data that is used, among other things, to create derivative instruments rather than to trade U.S. equity securities.³² However, the Commission notes that the Exchange does not address why the Program is an equitable allocation of reasonable fees other than to state that the proposal would facilitate “cost effective access to market information” that is used to compute pricing for certain derivative instruments.³³ The Exchange does not provide other explanations for why the Program is an equitable allocation of reasonable fees, such as why it is consistent with the Act to charge a greater Distributor fee for the Program than the current Derived Data White Label Service.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”³⁴ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,³⁵ and any failure of an SRO to provide this information may result in the Commission

³¹ See Notice, supra note 4, 84 FR at 42974.

³² See id. at 42973.

³³ See id.

³⁴ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

³⁵ See id.

not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.³⁶

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.³⁷

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³⁸

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may

³⁶ See id.

³⁷ See 15 U.S.C. 78f(b)(4), (5), and (8).

³⁸ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CboeEDGX-2019-049 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeEDGX-2019-049. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeEDGX-2019-049 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,³⁹ that File No. SR-CboeEDGX-2019-049 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

Jill M. Peterson
Assistant Secretary

³⁹ 15 U.S.C. 78s(b)(3)(C).

⁴⁰ 17 CFR 200.30-3(a)(57) and (58).

